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**In the
Supreme Court of the United States**

OCTOBER TERM 1990

**THADDEUS DONALD EDMONSON,
Petitioner**

versus

**LEESVILLE CONCRETE CO.,
Respondent**

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**BRIEF OF AMICUS CURIAE,
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IN SUPPORT OF LEESVILLE CONCRETE CO.,
RESPONDENT**

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In The
SUPREME COURT OF THE UNITED STATES
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THADDEUS DONALD EDMONSON
Petitioner

versus

LEESVILLE CONCRETE CO.,
Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

Brief of Amicus Curiae,
Louisiana Association of Defense Counsel
in support of Leesville Concrete Co., Respondent

STATEMENT OF INTEREST

Founded in 1963, the Louisiana Association of Defense Counsel (LADC) is a non-profit corporation with 1500 members who are engaged in civil litigation in state and federal courts. Although member attorneys handle some plaintiff matters, they are primarily defense-oriented and represent thousands of individual homeowners, car and truck drivers, non-profit institutions, and small business owners, as well as major corporations and insurance companies. Through legal seminars and newsletters, LADC promotes high professional standards among its members.

LADC's commitment to its clients and to the adversary system raises its interest in the resolution of the legal

issue before this Court.¹ LADC believes that application of the *Batson* Rule² to civil litigation will profoundly and detrimentally affect the adversary system by distorting the jury selection process. LADC further fears that the *Batson* Rule will result ultimately in the abolition of all peremptory challenges. For these reasons, LADC urges the affirmance of the opinion of the Fifth Circuit.

SUMMARY OF ARGUMENT

Congress enacted the Thirteenth, Fourteenth, and Fifteenth Amendments after the Civil War to outlaw slavery, protect the civil liberties of the newly emancipated citizens, and "abolish all badges and incidents of slavery in the United States."³ Since that time, the courts have been involved in a dialogue with Congress and the citizens of the nation on the proper application of the civil rights principles to a multitude of situations that run throughout the fabric of public and private life. At issue now is whether racial justice requires application of the *Batson* Rule on peremptory challenges to civil litigation. This is not an easy issue, but historical, constitutional, and practical considerations weigh against mandating such a major modification in civil practice.

For more than 800 years, the peremptory challenge has been part of a cluster of procedures (random selection of the array, voir dire, challenge for cause, peremptory challenge) that insure the impartiality of the jury. Although the form of the peremptory strike varied

¹ This brief is submitted upon the written consent of all parties, copies of which are filed herewith.

² *Batson v. Kentucky*, 476 U.S. 79 (1986).

³ *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

somewhat at each stage of its development, restrictions on its use were invariably counterbalanced by greater freedom in other parts of the cluster. Thus, in the civil trials of the 1600s and 1700s where two impartial "triers" had to approve a challenge "to the favor" (a challenge for which no objective proof could be given), the litigant had extreme liberty in voir dire and automatic challenges for cause. American jurisprudence shifted the balance somewhat, providing more judicial control of voir dire and challenges for cause and allowing complete discretion in the use of the peremptory challenge. The *Batson* Rule would disrupt the balance that has been struck through historical evolution without providing any compensating mechanisms.

The constitutional questions involved in this matter arise from the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, and the right to trial by jury, guaranteed by the Seventh Amendment. The Equal Protection Clause applies only to government conduct. LADC maintains that a private attorney who represents a private party in civil litigation and who performs an attorney's traditional function is not a state actor. Neither are the trial judges when they passively observe the peremptory challenges, for they neither grant nor deny the challenges but merely acquiesce in their use. To find state action in the use of peremptory strikes would constitutionalize all conduct by civil litigants.

Due Process requires a fair and impartial jury; it does not entitle litigants to a jury of any particular racial, social, or economic composition. The use of the peremptory challenge for so long to promote impartiality on the jury panel suggests, in fact, that due process might require the unimpaired right to exercise peremptory challenges. The *Batson* Rule would impair this right by creating different

burdens for similarly situated litigants, by preventing challenges to minority litigants who are themselves racially biased, by requiring objective evidence of subjective impressions, and by allowing complete denial of particular challenges. Due to the infinite variety of cognizable groups, *Batson* would be unworkable in the civil trial. Eventually, it could cause the complete abolition of peremptory challenges by legislative bodies concerned by the proliferation of *Batson*-style hearings based on gender, religion, ethnicity, and economic class.

ARGUMENT

Like the Petitioner, the Louisiana Association of Defense Counsel (LADC) deplores the sometimes tragic history of American race relations and recognizes the need to eliminate discriminatory practices — both overt and subconscious — from the courtrooms of the country. Thaddeus Donald Edmonson, plaintiff-petitioner, asks this Court to apply the *Batson* Rule to civil litigation and to require litigants to offer clear, specific, and racially neutral reasons for peremptory challenges directed to persons who belong to minority races. As Amicus Curiae, LADC respectfully maintains that the *Batson* Rule, while appropriate in the special context of criminal trials, would upset the balance of time-honored procedures that guarantee due process in civil trials, without reducing racism.

1. *THROUGHOUT THE HISTORICAL DEVELOPMENT OF THE JURY TRIAL, THE PEREMPTORY CHALLENGE SERVED TO GUARANTEE FAIRNESS AND IMPARTIALITY.*

The Supreme Court recognizes the continuous use of

peremptory challenges since the time of the early common law and the importance of the challenge in insuring due process of law:

The tradition of peremptory challenges for both the prosecution and the accused was already venerable at the time of Blackstone, . . . was reflected in a federal statute enacted by the same Congress that proposed the Bill of Rights, . . . was recognized in an opinion by Justice Story to be part of the common law of the United States, . . . and has endured through two centuries in all the States, . . . The constitutional phrase "impartial jury" must surely take its content from this unbroken tradition.⁴

As the discussion below will show, the form of the peremptory challenge has varied according to the times and the context (civil or criminal). The impartiality of the jury was preserved not through a single procedure but by a cluster of related practices (random selection of the array, voir dire, challenge for cause, peremptory challenge). When one procedure underwent change, the others were adjusted to maintain the balance.

WILLIAM THE CONQUEROR, HENRY II, BRACTON

Group decision-making characterized English political life and contributed to the development of the common law jury trial.⁵ William the Conqueror used jurors as sworn witnesses in the compilation of the Domesday Book and the examination of some criminal matters. Under Henry II (1154-1189), groups of carefully chosen men were

⁴ *Holland v. Illinois*, 110 S.Ct. 803, 808 (1990) (citations omitted).

⁵ J.S. Cockburn & T.A. Green, *Twelve Good Men and True* 363 n. 6 (1988).

impaneled in each county to render verdicts in land disputes.⁶ The jury also decided cases of trespass and contract. The use of the jury in private litigation influenced criminal trials, especially after 1215 when the Catholic Church abolished the ordeal as the accepted method of proof. In turn, the criminal jury affected the subsequent development of the civil jury.⁷

Early challenges may have contained elements of both the peremptory challenge and the challenge for cause. When a criminal defendant alleged malice on the part of a juror, the court accepted his declaration as conclusive.⁸ Henri de Bracton (d. 1285) explained the rule of challenges in this way: "[I]f there is ground for suspicion, all are to be removed, that the inquiry may proceed free of all doubts."⁹

BLACKSTONE

In the Eighteenth Century, Blackstone explained that litigants in English trials were allowed "challenges to the array" (exceptions to the whole panel based on the partiality of the sheriff who summoned the jurors) and "challenges to the poll" (exceptions to the particular juror).

In criminal cases, at least in capital ones, there is, in favorem vitae, allowed to the prisoner an arbitrary species of challenge to a certain number of jurors, without showing any cause whatever,

⁶ Van Dyke, *Jury Selection* 2-5 (1977).

⁷ Cockburn & Green, *supra* note 5, at xvi, 3.

⁸ Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 163 (1989).

⁹ 2 Of the Laws and Customs of England 405.

which is termed a peremptory challenge. This is grounded on two reasons: (1) Sudden impressions and unaccountable prejudices are sometimes awakened by the mere looks and gestures of another, which might affect a prisoner as to a jurymen, and render him reluctant to have his case tried before him. (2) Because, upon failure to establish a challenge for cause, the mere fact of challenging might awaken the resentment of a juror; and to prevent ill consequences therefrom, a prisoner is permitted to peremptorily challenge him.¹⁰

The jurisprudence allowed defendants unlimited challenges for cause and 35 peremptory challenges. After Parliament passed the Ordinance of Inquests in 1305, the Crown gave up peremptory challenges per se, but it replaced them with the practice of asking unacceptable jurors to "stand aside." The jurors who stood aside were called only if all other jurors were exhausted.¹¹

The practice in civil trials was somewhat different. Litigants had greater leeway than in criminal trials to examine the jurors as to bias during voir dire.¹² Jurors could be challenged for suspicion of bias or partiality. "Principal challenges" (challenges for cause) "carried with them *prima facie* evident marks of suspicion, either of malice or favor."¹³ They were automatically granted and could not

¹⁰ W. Blackstone, 4 *Commentaries* 907 (Gavin ed. 1941).

¹¹ Alschuler, *supra* note 8, at 166 n. 53; *Holland v. Illinois*, 110 S.Ct. at 808 n.1.

¹² Gutman, *The Attorney-Conducted Voir Dire of Jurors*, 39 *Brooklyn L. Rev.* 290, 293-94 (1972).

¹³ W. Blackstone, 3 *Commentaries* 678 (Gavin ed. 1941).

be overruled. The litigants could also make "challenges to the favor." If the opposing party questioned the challenges, the matter was decided by the other jurors or by two "triors."

Challenges to the favor are where the party has no principal challenge, but objects only from some probable circumstance of suspicion, as acquaintance and the like; the validity of which must be left to the determination of triors, whose office is to decide whether the juror be favorable or unfavorable.¹⁴

Thus, it is not true that there were no peremptory challenges in English civil trials, but they were handled differently — somewhat like a *Batson* peremptory without the racial considerations. At the same time, it is important to realize that the restricted peremptory challenge was counterbalanced by unfettered voir dire and by unassailable challenges for cause.

THE UNITED STATES

When the jury trial came to the American colonies, the concept of the peremptory challenge was firmly attached. Indeed, one of the factors leading to the American Revolution was the Crown's tendency to seek biased jurors in political trials and to deny defendants an opportunity to discover biases through voir dire.¹⁵ The memory of oppressive court practices influenced the debates surrounding the establishment of the American government. During debates on the Amendments to the Constitution, James

¹⁴ *Id.* at 679.

¹⁵ Gutman, *supra* note 12, at 294.

Madison explained:

Where a technical word was used [trial by jury], all incidents belonging to it necessarily attended it. The right to challenge is incident to the trial by jury, and therefore, as one is secured, so is the other.¹⁶

Thus, while the right to a jury trial is preserved in general terms in the Sixth and Seventh Amendments, the First Congress of the United States reaffirmed the common law right of peremptory challenges.¹⁷

Since constitutional times every, court decision has affirmed the importance of peremptory challenges. "While the Constitution does not confer a right to peremptory challenges, these challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury."¹⁸ American legislators and jurists unequivocally incorporated this right in civil litigation. "The denial or substantial impairment of the statutory right of peremptory challenge is prejudicial to the constitutional right to a fair and impartial jury."¹⁹

The Federal Jury Selection and Service Act of 1968²⁰ was enacted to overcome prejudicial jury selection practices such as the "key man" system and the imposition of special qualifications upon the jurors. Even while commanding the federal courts to select jurors at random from

¹⁶ *Id.* 296-97.

¹⁷ Act of April 30, 1770, ch. 9 sect. 30, 1 Stat. 119.

¹⁸ *Batson*, 476 U.S. at 84.

¹⁹ *Photostat Corp v. Ball*, 338 F.2d 783, 786 (10th Cir. 1964). See also *Kiernan v. Van Schaik*, 347 F.2d 775 (3rd Cir. 1965).

²⁰ 28 U.S.C. 1861 *et seq.*

voter registration lists, the House Committee emphasized that the new selection process did not alter in any way the right of litigants to exercise peremptory challenges.

The act guarantees only that the jury shall be "selected at random from a fair cross section of the community." It does not require that at any stage beyond the initial source list the selection process shall produce groups that accurately mirror community makeup . . . In particular, the bill leaves undisturbed the right of a litigant to exercise his peremptory challenges to eliminate jurors for purely subjective reasons.²¹

The peremptory challenge and the trial by jury have evolved together throughout the centuries. The peremptory challenge is an integral part of the trial by jury. Denial or alteration of that right profoundly alters the trial and thus compromises due process.

2. WHILE SPECIAL CIRCUMSTANCES JUSTIFY THE BATSON RULE IN CRIMINAL TRIALS, IT SHOULD NOT BE EXTENDED TO CIVIL LITIGATION

While invoking *Batson* as a precedent for requiring a racially neutral explanation for the exercise of peremptory strikes, the Petitioner has failed to examine some important differences which provide an underlying rationale for the *Batson* decision.

The prosecutor has a built-in advantage over the defendant and the civil litigant in that 25 to 30 per cent of the members of the state jury pools believe

²¹ 1968 U.S. Code Cong. & Ad. News 1792, 1794-95.

that a defendant is probably guilty once indicted.²² Additionally, public fear of crime committed by minority persons can approach irrational levels, as indicated by the Willie Horton affair or the case of Charles Stuart, the Boston man who claimed he and his pregnant wife were shot by a black youth from a nearby housing project. No such irrational fear operates in the context of the civil trial.

The number of peremptory challenges in a criminal trial offers less incentive to a prosecutor to pick and choose as carefully as a civil litigant. At the federal level, the prosecutor has 20 challenges in capital cases, 6 in felonies, and 3 for offenses punishable by imprisonment of one year or less.²³ The civil litigant, on the other hand, has only three peremptory strikes. Thus the civil challenge system "contains an internal sanction against abuse: the party who insists on challenging jurors on the basis of questionable stereotypes increases his chances of removing friendly jurors and decreases his opportunities for excluding more biased veniremen."²⁴

The prosecutor's duty as a state representative is to insure that the accused is tried by an impartial jury, not to impanel a jury composed of individuals more likely to convict. "The public prosecutor cannot take as a guide for the conduct of his office the standards of an attorney appearing on behalf of an individual client. The prosecutor must recall that he occupies a dual role. . . [1] to furnish that

²² Comment, *Survey of the Law of Peremptory Challenges: Uncertainty in the Criminal Law*, 44 U. Pitt. L. Rev. 673, 700 (1983) (citing *Hearing Before the Subcommittee On Criminal Justice*, 95th Cong., 1st Sess. 6, at 254).

²³ Fed. R. Crim. P. 24(b).

²⁴ Salzberg & Powers, *Peremptory Challenges and the Clash between Impartiality and Group Representation*, 41 Md. L. Rev. 337 (1982).

adversary element essential to the informed decision of any controversy . . . [and 2] [to accomplish] impartial justice."²⁵

The prosecutor has no Sixth Amendment right to a fair trial since he has no personal stake in the outcome. Unlike the civil litigant, the prosecutor is clearly a state actor.

3. ***AN EQUAL PROTECTION ANALYSIS SHOULD NOT BE APPLIED TO PEREMPTORY CHALLENGES IN CIVIL LITIGATION BECAUSE A FINDING OF "STATE ACTION" WOULD CONSTITUTIONALIZE ALL CONDUCT BY CIVIL LITIGANTS.***

The Fourteenth Amendment provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Although the Fifth Amendment contains no equal protection clause, the Supreme Court held that such discrimination by the Federal Government is a violation of "due process of law."²⁶ Both amendments apply only to government entities and government action. The Equal Protection Clause "prohibits discriminatory action by the State but erects no shield against private conduct however discriminatory or wrongful."²⁷

One of the primary purposes of the State Action Doctrine is to preserve individual freedom. "Careful adherence to the 'State action' requirement preserves an area of individual freedom by limiting the reach of Federal law and

²⁵ *Professional Responsibility*, 44 A.B.A.J. 1159, 1218 (1958).

²⁶ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

²⁷ *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

Federal judicial power. It also avoids imposing on the State, its agents, or officials, responsibility for conduct, for which they cannot fairly be blamed."²⁸

It is only when private conduct becomes significantly involved with government officials that equal protection considerations are implicated. In some cases, state action is clear. In others, the involvement of private and public parties may not give rise to State action. "[T]o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an impossible task which this Court has never attempted. Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."²⁹ The Supreme Court has, however, provided certain guidelines: (1) the Public Function Test, (2) the State Compulsion Test, (3) the Nexus Test, and (4) the Joint Action Test.³⁰

The Public Function Test is satisfied when a private person engages in activities that are traditionally associated with governmental entities. Thus, white political parties that fixed voting qualifications and ran primary elections were subject to constitutional limitations.³¹ In contrast, the exercise of peremptory challenges is not a public function. Since the earliest history of the common law and throughout the 200-year history of the United States, "the litigants have enjoyed this right. "[T]he Court is the judge of actual biases, but counsel is the sole and exclusive judge of whom he shall

²⁸ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

²⁹ *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961) (citations omitted).

³⁰ *Lugar*, 457 U.S. at 939.

³¹ *Smith v. Allright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953).

challenge for suspected biases or prejudice his client's cause."³²

The State Compulsion Test is applied when legislation, public officials, or courts require or encourage an unconstitutional practice by private persons. The Supreme Court found state action when state laws provided for racially segregated restaurants³³ and when white property owners sought a court order to enforce racially discriminatory covenants.³⁴ Neither the peremptory challenge statute³⁵ nor the judge in any courtroom can be said to require or encourage racial discrimination on the part of private litigants.

The Nexus Test arises when private persons and government bodies have multiple contacts or entanglement with each other. The Court found state action in *Burton v. Wilmington Park Authority*,³⁶ where a restaurant excluding blacks had a symbiotic relationship with a government board. The government built a parking facility with public funds and leased space to the restaurant. Rental payments by the restaurant helped pay for the facility. The restaurant owners enjoyed tax-exempt status when they made improvements to their space. The government benefitted from the convenience for its employees as well as from increased use of parking facilities. The Court held that the "State had so far insinuated itself into a position of interdependence with the restaurant that it was a joint participant in the enterprise."³⁷ On the other hand, the

³² *Photostat Corp. v. Ball*, 338 F.2d 783 (10th Cir. 1964).

³³ *Peterson v. City of Greenville*, 373 U.S. 244 (1963).

³⁴ *Shelly v. Kraemer*, 334 U.S. 1 (1948).

³⁵ 28 U.S.C. 1870.

³⁶ 365 U.S. 715 (1961).

³⁷ Discussed in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974).

Supreme Court held that there was no state action in *Jackson v. Metropolitan Edison Co.*³⁸ despite government licensing, regulation, and authorization of termination procedures of a privately owned utility.

While peremptory challenges occur in a courthouse, which is a public building, it cannot be said that the federal judge insinuates himself into a position of interdependence with the private attorneys. Instead, the justice system requires complete independence on the part of each attorney and the judge. Since the litigants have traditionally exercised peremptory challenges with complete discretion, this conduct cannot fairly be attributed to the judge.

In *Lugar v. Edmondson Oil Company*,³⁹ the Supreme Court used a two-pronged Joint Action Test to determine whether the deprivation of a federal right could be fairly attributable to the State. First, the deprivation must be caused by the exercise of a privilege created by the state. Secondly, the person who has caused the deprivation must be either a state official or someone who has obtained significant aid from state officials. The *Lugar* Court found state action in the prejudgment attachment of property because (1) the creditor had relied on a state sequestration statute and (2) the creditor received significant assistance from the judge who signed and the sheriff who executed the writ of attachment. In the matter at bar, the issue is whether the judge renders significant aid to private litigants when he allows them to exercise a right that has been theirs since the common law development of trial by jury. Put another way, is the judge overtly and actively involved in this dismissal or does he merely acquiesce in a decision made by a private party in an area where the

³⁸ 419 U.S. 345 (1974).

³⁹ 547 U.S. 922 (1982).

statutes and jurisprudence allow unfettered discretion?⁴⁰

Not every judicial proceeding will involve overt significant aid or give rise to state action. "[M]erely resorting to the courts and being on the winning side of a lawsuit does not make a party a . . . joint actor with the judge."⁴¹ For example, a public defender employed by the State filed a Motion to Withdraw as Counsel and a trial court granted the motion. It was within the discretion of the trial court to deny the motion. The Supreme Court found that "[A] public defender does not act under color of state law when performing a lawyer's traditional function as counsel."⁴²

Private attorneys representing private parties in civil actions are not state actors. Because the involvement of the judge in the exercise of the peremptory challenge is minimal and satisfies none of the tests discussed above, LADC urges the Court to find no state action. Further, LADC suggests respectfully that a finding of state action would have far-reaching and unintended ramifications, tending to constitutionalize all courtroom activity by civil litigants. For example, it could lead to the demand that the *Brady* Rule⁴³ apply to civil litigants or create potential 1983 Actions⁴⁴ from every case.

⁴⁰ See *Tulsa Professional Collection Services v. Pope*, 108 S.Ct. 1340 (1988) and *Blum v. Yaretsky*, 457 U.S. 991 (1982).

⁴¹ *Dennis v. Sparks*, 449 U.S. 24, 28 (1980).

⁴² *Polk County v. Dodson*, 454 U.S. 312 (1981); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982) held that "under color of state law" and "state action" are the same thing.

⁴³ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁴⁴ 42 U.S.C. 1983.

4. *THE SEVENTH AMENDMENT DOES NOT REQUIRE A REPRESENTATIVE CROSS SECTION ON THE JURY PANEL.*

Adopting a Sixth Amendment argument and applying it by analogy to the Seventh Amendment right to juries in civil trials, Petitioner maintains that he lost "his fair possibility for obtaining a representative cross-section of the community" when Respondent used two peremptory challenges to strike African-Americans from the panel. The Supreme Court has rejected the idea that the cross-section requirement applies to the petit jury.

We reject petitioner's fundamental thesis that a prosecutor's use of peremptory challenges to eliminate a distinctive group in the community deprives the defendant of a Sixth Amendment right to the "fair possibility" of a representative jury. While statements in our prior cases have alluded to such a "fair possibility" requirement, satisfying it has not been held to require anything beyond the inclusion of all cognizable groups in the venire.⁴⁵

The Court explained that the fair cross section rule for the venire was a "means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)."⁴⁶ The Court further reasoned that such a requirement would "undermine rather than further the constitutional guarantee of an impartial jury" by "crippl[ing] the device of peremptory challenge."⁴⁷ Other

⁴⁵ *Holland v. Illinois*, 110 S.Ct. at 806.

⁴⁶ *Id.* at 807.

⁴⁷ *Id.* at 806, 809.

Supreme Court opinions have emphasized that a representative cross section requirement would be "unsound and unworkable"⁴⁸ and that litigants are "not entitled to a jury of any particular composition."⁴⁹

5. THE PEREMPTORY CHALLENGE FUNCTIONS WITHIN THE ADVERSARY SYSTEM TO PROMOTE IMPARTIALITY ON THE JURY.

In both criminal and civil cases, the purpose of the jury is to assure a fair and equitable determination of the factual issues. The selection of impartial jurors is achieved through the use of three complementary procedures: (1) random selection of the venire, (2) challenge for cause, and (3) peremptory challenge.⁵⁰

The random selection of potential jurors from representative lists of citizens insures a cross section of the community; however, it does not exclude jurors who are biased. Challenges for cause begin the process of excluding biased jurors, but many biased jurors slip through the net because of the narrow grounds for challenge, the court-conducted voir dire, and the reluctance of jurors to admit their prejudice.⁵¹

Most jurors are like most people: They tell you what you want to hear. . . .

If a juror informs you that her mother was killed in a car accident, that same juror may nevertheless say she can be fair and impartial to the defendant. . . . Get her off the jury. The best way

⁴⁸ *Lockhart v. McCree*, 476 U.S. 162, 173-74 (1986).

⁴⁹ *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975).

⁵⁰ *Salzburg & Powers*, *supra* note 24.

⁵¹ *Id.* at 340.

is to have her admit her underlying resentment. . . . But don't push. If there is resistance, [u]se a peremptory challenge. That is what they are there for. . . .

If you see the juror's face stiffen and through clenched teeth he says he can be fair, don't ask "Are you prejudiced against Arabs?" His answer will be no. The bigot — and all the other jurors — will resent the question, because no one in this country believes he is prejudiced against anyone or anything. Everyone is always fair. To say that someone cannot be fair is to say that someone cannot be an American and does not believe in democracy.⁵²

The peremptory challenge gives litigants a finer net to remove those people whom the litigants suspect of unconscious, concealed, or unprovable bias.

While some commentators deprecate "hunches," expert trial advocates continue to rely on them:

Trust your instincts. If your jury survey tells you that a young, married woman is the perfect juror for your case, but there is something that you do not like about the person who meets that description kick her off. Use your common sense, that is what you are being paid for — to evaluate and communicate. Everything about the guy — his name, his age, his sex, his race, his religion — says yes, but there is something about him that you cannot figure out, excuse him.⁵³

The American legal system is adversarial; it assumes

⁵² *Nolan, Jury Selection*, 16 *Litigation* 24, 24 and 26 (Spring 1990).

⁵³ *Id.*

that justice can best be achieved when lawyers zealously represent the individual interests of their clients. As advocates, lawyers try to select a jury that will be fair, that will be favorably disposed to them, their clients, and their cases, and that will return a favorable verdict. The opponents, of course, are also looking for a favorable jury. "When two evenly matched adversaries participate in the jury selection process, injecting their concepts of a good jury into that process, they will ultimately select a jury that will fairly and impartially hear the evidence and reach a just verdict."⁵⁴

By enabling each side to exclude those jurors it believes will be most partial toward the other side, peremptory challenges remove extremes of opinion and partiality.⁵⁵ Peremptory challenges are "hedges against an unlucky roll of the jury wheel."⁵⁶ They allow attorneys to remove people who seem erratic, anti-social, or incapable of understanding the issues. On many occasions, plaintiffs and defendants may agree on the unsuitability of certain candidates for the panel. At other times, the very jurors that one side wants the most will be the ones challenged by the adversary. Both sides instinctively recognize a *je ne sais quoi*, indicating that the jurors are predisposed to favor a litigant. The petitioner misunderstands the function of peremptory challenge, when he complains that his opponent removed two "members of Edmonson's race, who may have otherwise been anticipated to be predisposed towards Edmonson's position."⁵⁷ In the name of fairness,

⁵⁴ T. Mauet, *Fundamentals of Trial Techniques* 31 (1980).

⁵⁵ *Holland v. Illin*, 110 S.Ct. at 809.

⁵⁶ Pizzi, *Batson v. Kentucky: Curing the Disease but Killing the Patient*, 1987 Sup. Ct. Rev. 145.

⁵⁷ Petition for Writ of Certiorari, p. 7 (emphasis supplied).

the petitioner would have his opponent compete in the adversary system with one hand tied behind his back.

The peremptory challenge is not a superstitious vestige of medieval practices. The Supreme Court has said, "The right is a traditional, arbitrary and capricious one and it must be exercised with full freedom or it fails of purpose."⁵⁸ The denial or impairment of the right of peremptory challenge is reversible error. A trial court may not refuse to let a litigant reserve a challenge to exercise against replacement members of a panel.⁵⁹ A court may not prevent the intelligent use of peremptory challenges by unfairly restricting voir dire.⁶⁰ A new trial may even be required if a judge improperly denies a challenge for cause and thereby compels the unnecessary use of a peremptory challenge.⁶¹

6. ***APPLICATION OF THE BATSON RULE TO CIVIL LITIGANTS WOULD SIGNIFICANTLY IMPAIR THE RIGHT OF PEREMPTORY CHALLENGES AND CAUSE SIMILARLY SITUATED LITIGANTS TO BE TREATED DIFFERENTLY.***

Application of the *Batson* Rule to civil trials would impair the right to exercise peremptory challenges in various ways: (1) it prevents challenges to minority persons who are themselves racially prejudiced; (2) it requires the marshalling of evidence in a situation where it is difficult or impossible to obtain; (3) it creates different burdens

⁵⁸ *Lewis v. United States*, 146 U.S. 370, 378 (1892).

⁵⁹ *Carr v. Watts*, 597 F.2d 830, 832 (2d Cir. 1979).

⁶⁰ *Kiernan v. Van Schaik*, 347 F.2d 775 (3rd Cir. 1975).

⁶¹ *United States v. Rucker*, 557 F.2d 1046 (4th Cir. 1977).

for similarly situated litigants; and (4) it provides that peremptory challenges may be denied by the court.

It is wrong to assume that no black person or other minority citizen can be fair to members of the majority race. "[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State case against a black defendant."⁶² However, it is also wrong to assume that a particular person would be incapable of bias. In fact, one white person on Edmonson's panel of prospective jurors openly expressed racial hostility and was excluded for cause. Even if he had said nothing, as is the case with most jurors, he was unfit for jury duty and should have been excluded through use of a peremptory challenge. Similarly, a small number of black jurors could be hostile to white litigants or predisposed to favor people who share their race.

Even assuming *arguendo* that a court would allow civil litigants to assert that a particular juror would be racially biased, they would be obliged to provide some objective evidence of this belief. Although *Batson* provides that the "explanation need not rise to the level justifying exercise of a challenge for cause,"⁶³ the burden still places the attorneys at a disadvantage. If they could prove bias, they could make a challenge for cause. They must try to find objective evidence of subjective impressions. If the explanation is not accepted by the trial court, a biased person may remain on the panel.

Meanwhile, the opposing attorney may issue

⁶² *Batson*, 476 U.S. at 39.

⁶³ *Id.*

challenges with absolutely no explanation, and all of them will be granted. The *Batson* Rule creates two kinds of peremptory challenge and two classes of challengers, producing inconsistencies and unfairness rather than equal protection of the law.

7. APPLICATION AS WRITTEN OF THE BATSON CRITERIA TO CIVIL LITIGATION WILL RESULT IN THE ELIMINATION OF THE PEREMPTORY STRIKE IN CIVIL CASES, A RESULT NOT JUSTIFIED FROM A POLICY STANDPOINT AND A RESULT NOT INTENDED BY THE BATSON MAJORITY.

Preamble

The majority in *Batson* did not intend to eliminate the peremptory strike in those cases to which *Batson* applied. LADC deduces the intent to preserve the peremptory challenge from the fact that there was a strong concurring opinion by one member of the Court in whose view the peremptory strike could not be justified on constitutional grounds. Moreover, LADC maintains that the peremptory strike has a position in American trials protected by years of custom and use.

No showing has been made by the Petitioner which would justify the total emasculation of the peremptory strike which would result from the enforcement of the rule of the *Batson* case in the civil trial system in the United States.

Further, *Batson* was decided by this Court on an Equal Protection ground, not on a Sixth Amendment "Right to Trial by Jury" ground. The linch-pin of an Equal Protection challenge is the finding that state action is

involved. The action of the prosecutor in a criminal trial is clearly the action of the state. The prosecutor is a state employee performing a state function at the time this allegedly discriminatory exercise of peremptory strikes occurs.

The opinion of the Fifth Circuit in the case at bar effectively demonstrates that the action of an attorney for a private litigant, be that litigant plaintiff or defendant, cannot be "state action" in the sense that the term is used in the *Batson* opinion. The same is true as to the judge who passively reacts to the peremptory challenge exercised by the attorney for the civil litigant. The LADC brief hereinabove also demonstrates these points.

Put another way, if this Court is of a mind to hold that the action of a private litigant or his attorney constitutes state action, then Respondent and LADC have lost this case. By the same token, if this Court is convinced that the action of an advocate for a civil litigant is not a "state action," the *Batson* Rule cannot apply under the precise terms of the *Batson* case. Petitioner will have to search for a different legal ground on which to premise his case. However, the courts have held that the Sixth (in criminal cases) and the Seventh (in civil cases) Amendments do not require a petit jury which is racially or otherwise balanced. For lack of legal grounds to invoke the *Batson* rule in civil cases, the Supreme Court should affirm the holdings of the courts below.

Batson is Unworkable in the Civil Context

Whatever the vehicle for its enforcement in civil trials, the *Batson* rule would create enormous practical difficulties, resulting in the emasculation or outright elimination of the peremptory strike in civil litigation.

The rule of *Batson* is that a lawyer exercising a peremptory strike must exercise it in a racially non-discriminatory manner. In order to set in motion the determination that a strike is improper under this rule, the defendant⁶⁴ must show that he is a member of a "cognizable racial group." He must also show that the prosecutor has peremptorily struck venire members who are of the defendant's race.

Upon the lodging of the charge that there has been a violation of the *Batson* Rule, the court, considering the above facts and other relevant circumstances, must determine that there has been a violation. If it makes this determination, the prosecutor must come forward with a race-neutral explanation for the strikes, failing which, the strikes will be voided. The explanation has to be more than a general assertion of counsel's good faith (the acceptance of which would render the whole procedure a "vain and illusory requirement"⁶⁵) Failure satisfactorily to explain the strikes would result in their being voided.

As already mentioned, the *Batson* Rule applies only to the prosecutor. It can be no other way because the "state" whom the prosecutor represents has no race, creed, or color which can be subject to the *Batson* requirement. Thus, *Batson* according to its terms, applies only to the defendants's objection to the prosecutor's strikes simply because, logically, it can be no other way.

The *Batson* Rule is workable in a criminal context. It is not workable in a civil context. This fact should be plain,

⁶⁴ *Batson* was a criminal case. The rule applicable to the prosecutor would not apply to the attorney for the defendant. The *Batson* opinion does not say that it does, and logically it cannot. See *infra*.

⁶⁵ *Batson*, 476 U.S. at 98 (citation omitted).

but if it is not, it is demonstrable by a very simple hypothetical situation. Suppose there is a jury trial with a black plaintiff and a white defendant. With no difficulty, each party can show that he is a member of a cognizable racial group and, therefore, entitled to *Batson* protection if it applies in civil litigation. When the judge calls upon the black female plaintiff, for example, to justify her strikes, he may be told that a certain juror was challenged because he was a management-level white male who belonged to a fundamentalist sect and who seemed critical of women, blacks, and people who bring lawsuits. The judge must determine, then, what percentage of the strike was based upon racial considerations and whether the strike would be permissible under the *Batson* Rule. The white defendant may give similar reasons. This administrative nightmare would be increased by the addition of more "sides" and more lawyers.

The unworkability would then be geometrically aggravated if the requirement of *Batson* were applied to the ubiquitous "clone rule." Almost all civil trial lawyers seek to avoid having on the jury persons who are "clones" of the opponent; i.e., persons who are alike in age, habitus, family, income, occupation, religion, race, etc. Rather than allow trial courts to be overwhelmed by *Batson*-style hearings based on gender, age, and other clone-factors, Congress and the state legislatures would be called upon to abolish peremptory challenges completely. The Supreme Court would then be considering the issue of whether a trial without peremptory strikes is constitutional.

Another point must be made. Lawyers who follow the clone rule consider a wide range of factors. Having only three peremptory strikes, they cannot assume automatically that all black jurors will favor a black litigant. Thus, race usually plays an insignificant part in the equation. Judges who allow thorough and probing voir dire further reduce

the chance of stereotypical characterizations by causing each juror to appear as an individual.⁶⁶

Selective Peremptory Challenges Do Not Stigmatize the Jurors

The Petitioner claims that racial discrimination in the exercise of peremptory challenges harms the litigant, the excluded juror, and society. The blanket exclusion of all black jurors would support Petitioner's argument; selective challenge does not. No individual has a right to hear any particular trial; no litigant has a right to have his case heard by a particular juror. In every trial, a certain number of people will be excluded by peremptory strikes. They may be disappointed; they may even feel bad because someone "did not want them." However, if the judge explains the operation of the system to them properly, they will understand that they are not being insulted or stigmatized. Each litigant tries to obtain the most favorable jurors possible. If exclusion in and of itself is stigmatizing, then no one—whether blue collar worker, college graduate, accident victim, housewife, or manager-type—should be subjected to the practice. The 800-year experience of English and American courts belies any such conclusion.

CONCLUSION

Race as the principal motivation for the exercise of the peremptory strike is wrong. It is morally wrong whenever it is the principal motivation of a peremptory strike, whether that strike is in a criminal or civil case. It is legally wrong when it is made the subject of state action.

⁶⁶ See Singer + Singer, *Voir Dire By Two Lawyers: An Essential Safeguard*, 57 *Judicature* 386 (1974); Comment, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 *Harv. C.-R.-C.L. L. Rev.* 227 (1986).

It is neither morally nor legally wrong when it is an *incidental* part of the decision to exercise a peremptory strike.

The *Batson* Rule, carefully crafted to promote justice in the criminal trial, should not apply in the very different context of the civil trial. The prosecutor is clearly a state actor. The prosecutor has no liberty or property interest in the outcome of the trial; thus, he does not have the same claim to due process as the defendant or the private litigant. The private litigant enjoys no built-in prejudice in his favor as does the prosecutor. The private litigant has only three peremptory strikes and cannot afford to use them unless he feels the potential jurors are truly biased or predisposed to favor his opponent.

In contemporary American society, the litigant must consider a number of factors when trying to impanel a jury that will be favorable to him. His opponent, under the rules of the adversary system, will do the same. The *Batson* Rule would impair this process by requiring objective explanations for subjective impressions. If the *Batson* Rule were applied only to race, it would create two types of peremptory challenges and two classes of challengers. Due process requires that all litigants exercise their challenges in a similar manner. However, if all litigants were allowed to invoke the rule on the basis of other cognizable groupings, chaos would result. Rather than allow the courts to be buried in an avalanche of *Batson*-style hearings, the legislative bodies of the nation would seek to abolish the right of the peremptory challenge completely.

LADC urges the Supreme Court to preserve this historic and statutory right without distortion. LADC urges this Court to affirm the well-reasoned opinion of the United States Court of Appeals for the Fifth Circuit, sitting *en banc*.

Respectfully submitted,

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